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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA

v.

WALTER PALMA,  
a/k/a "Kapone,"

Defendant.

No. 3-08-70507-BZ (SPERO)

GOVERNMENT'S RESPONSE TO  
DEFENDANT'S MOTION TO DISMISS  
COMPLAINT

Courtroom: A, 15<sup>th</sup> Floor  
Hearing date: August 20, 2008  
Time: 9:30 am

The defendant, Walter Palma, has moved the Court to dismiss Complaint 3-08-70507-BZ, charging him with illegal possession of a firearm, in violation of Title 18, United States Code, Section 922(g)(5). For the following reasons, the defendant's motion to dismiss is meritless and should be denied.

**Discussion**

The defendant is charged in a criminal complaint with one count of violating Title 18, United States Code, Section 922(g)(5), which provides, in relevant part, that

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1 It shall be unlawful for any person —

2 . . . .

3 (5) who, being an alien —

4 (A) is illegally or unlawfully in the United States; or (B)  
5 except as provided in subsection (y)(2), has been admitted  
6 to the United States under a non-immigrant visa (as that  
term is defined in section 101(a)(26) of the Immigration  
and Nationality Act (8 U.S.C. 1101(a)(26)));

7 . . . .

8 to . . . possess in or affecting commerce, any firearm or  
9 ammunition; or to receive any firearm or ammunition which has  
been shipped or transported in interstate or foreign commerce.

10 18 U.S.C. § 922(g)(5).

11 The defendant contends that the criminal complaint that was filed against him is facially  
12 defective because, at the time of his possession of the charged firearm on or about November 2,  
13 2005, he was not illegal or unlawfully in the United States in that he was granted “Temporary  
14 Protected Status” (“TPS”).<sup>1</sup>

15 The defendant’s claim, however, is based on an incomplete reading of 18 U.S.C. §  
16 922(g)(5). Although subpart (A) of the statute prohibits the possession of a firearm by an illegal  
17 alien, subpart (B) of the statute — with four exceptions not applicable here<sup>2</sup> — prohibits the  
18 possession of a firearm by a lawful alien admitted under a nonimmigrant visa. Title 8, United  
19 States Code, Section 1254a, in turn, which established and governs TPS, indicates that an illegal  
20 alien granted TPS is not an immigrant alien but, rather, is to be treated as a lawful alien with

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22 <sup>1</sup> The Attorney General of the United States has the authority to confer Temporary  
23 Protected Status upon certain illegal alien applicants who face certain specified hardships in their  
24 respective countries of citizenship if, for humanitarian reasons, deportation would be undesirable.  
25 An alien with TPS is allowed to remain and work in the United States while his TPS lasts. See  
generally 8 U.S.C. § 1254a; 8 C.F.R. § 244.

26 <sup>2</sup> The four exceptions to 18 U.S.C. § 922(g)(5)(B) are listed under 18 U.S.C. §  
27 922(y)(2). These exceptions are: (A) an alien admitted under a nonimmigrant visa for a lawful  
28 hunting or sporting purpose; (B) an accredited official representative of a foreign government;  
(C) an official of a foreign government or distinguished foreign visitor so designated by the  
Department of State; and (D) a foreign law enforcement officer of a friendly foreign government  
in the United States on official business. See 18 U.S.C. § 922(y)(2)(A)-(D).

1 nonimmigrant status:

2 (f) Benefits and Status During Period of Temporary Protected  
3 Status

4 During a period in which an alien is granted temporary protected  
5 status under this section —

6 (1) the alien shall not be considered to be  
7 permanently residing in the United States under color  
8 of law;

9 (2) the alien may be deemed ineligible for public  
10 assistance by a State (as defined in section  
11 1101(a)(36) of this title) or any political subdivision  
12 thereof which furnishes such assistance;

13 (3) the alien may travel abroad with the prior  
14 consent of the Attorney General; and

15 (4) for purposes of adjustment of status under  
16 section 1255 of this title and change of status under  
17 section 1258 of this title, the alien shall be  
18 considered as being in, and maintaining, lawful  
19 status as a nonimmigrant.

20 8 U.S.C. § 1254a(f).

21 Thus, even though the defendant had TPS when he possessed a firearm on or about  
22 November 2, 2005, his TPS does not preclude his prosecution for illegal possession of the  
23 firearm. Rather, even with TPS, the defendant held, at most, lawful nonimmigrant status in the  
24 United States, and, therefore, violated subpart (B) of 18 U.S.C. § 922(g)(5). The Fifth Circuit  
25 case on which the defendant relies, United States v. Orellana, 405 F.3d 360 (5th Cir. 2005), is  
26 inapposite because in Orellana, the court considered only whether TPS conferred lawful status on  
27 an alien for the purpose of a prosecution under subpart (A) of 18 U.S.C. § 922(g)(5). See 405  
28 F.3d at 370-71. Indeed, not only did the Orellana court fail to consider the application of subpart  
(B) of § 922(g)(5), it also recognized that the grant of TPS effectively conferred only  
nonimmigrant status to the appellant. See id. at 366 (“[The appellant] was granted protection  
from removal, authorized to seek employment, and given the ability to apply for adjustment of  
status as if he were in lawful *non-immigrant* status.”) (emphasis added). Therefore, even with  
TPS, the defendant could and did violate 18 U.S.C. § 922(g)(5) when he possessed a firearm on  
or about November 2, 2005, as charged in the complaint.

**Conclusion**

For the foregoing reasons, the defendant's claim that the complaint failed to demonstrate that he committed a crime is meritless and his motion to dismiss the complaint should be rejected.

DATED: August 18, 2008

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By: /s/  
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